SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1151

FABERT MOTORS, INC.,
Plaintiff-Petitioner,

v.

FORD MOTOR COMPANY, a Corporation,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the Seventh Circuit.

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To the Court of Appeals of the Seventh Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals of the Seventh Circuit, not yet reported, but which is contained in the Addendum to this Petition. References (Add. ...) will be made to such Addendum, because of the interpretations of statutory material appearing therein; references to (App. ...) are to the Appendix filed with the Court of Appeals and in this Court.

BASIS OF JURISDICTION.

The judgment of the Court of Appeals was entered January 28, 1966. Petition for rehearing was denied March 2, 1966. Mandate was stayed March 7, 1966. Jurisdiction is invoked under Title 28, United States Code, § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

The primary question is whether the defendant, by pursuing a course of conduct placing the plaintiff dealer in a precarious economic situation, followed by a demand that plaintiff accept an Edsel franchise as a condition to retaining the Lincoln-Mercury franchises or resign—coupled with threats of cancellation, refusal to pay fair market value for signs, parts, and equipment, and other threats—creates a situation entitling plaintiff to a jury trial upon the issues of:

A. Economic or moral duress;

B. A violation of the Dealer's Day in Court Act;

C. A "tying" violation of the Sherman Act.

2. There is a further question as to whether a release, so secured, automatically bars an action for such statutory wrongs when the dealer, in effect, had no volition or whether a jury may determine whether enforcement of such release is unconscionable where secured by such coercive conduct.

STATUTORY QUESTIONS.

The pertinent statutes are the Dealer's Day in Court Act, 15 *U. S. C.*, §§ 1221-1224 and the Sherman Act, 15 *U. S. C.*, §§ 1, 14, 15. The pertinent portions of these statutes, and the discussions contained in the *Congressional & Administrative News* of the 84th Congress are contained in the Addendum.

STATEMENT OF THE CASE.

The facts are not accurately stated in the opinion of the Court of Appeals; therefore, they will be restated.

The Amended Complaint was filed in two counts. Count I was under the antitrust laws alleging illegal contracts or conspiracy on the part of the defendant to force the plaintiff and other Lincoln-Mercury dealers to accept an Edsel franchise as a condition to retaining their existing franchises; and, when plaintiff refused to accept such Edsel franchise, compelling plaintiff to resign its existing franchises and to execute a release, through economic compulsion and duress, for a consideration far less than the value of such franchise which was then worth $300,000. Count II was based upon the same facts but relief was sought under the Dealer's Day in Court Act. A motion to strike the Amended Complaint and to dismiss the action was filed and argued, but denied by Judge Robson in an extended opinion (App. 14-18). The defendant then filed an answer upon December 19, 1962, denying the charges of the complaint and denying that it at any time made the acceptance of the Edsel franchise a condition for retention of the Lincoln-Mercury franchises. Ford pleaded several affirmative defenses including the execution of the release which the plaintiff had assigned as one of the acts of duress in its Amended Complaint. Plaintiff filed a reply to the affirmative matters stating, in part (App. 24, 25) that the release was executed under moral or economic duress and in furtherance of the wrongful purpose in requiring an acceptance of a "tied" product. Two years after the filing of its answer, and only three weeks before the trial by jury was to commence, defendant Ford Motor Company filed a motion for summary judgment, supported by affidavits and depositions, which was countered by affidavits, exhibits, and depositions on behalf of the plaintiff. The trial court removed the case

from the jury calendar and, following argument, granted the motion for summary judgment (Abst. 70). This was affirmed by the Court of Appeals.

Since only those facts favorable to the plaintiff, and in the light most favorable to the plaintiff, may be considered upon a motion for summary judgment, we will disregard conflicts in stating the facts, which are as follows:

Elwood Fabert and Keith Kemper, as partners, operated a Lincoln-Mercury franchise in Champaign, Illinois, beginning in 1940 (App. 37). Both entered the armed services in 1942, rising to officer rank (App. 46), and were discharged in 1946 (App. 37, 46), at which time the partnership franchise was renewed. This franchise was operated until 1955, with the franchise net annual profits averaging $54,264.37 during this period (App. 38).

In 1955, the partners determined to dissolve the partnership. Both applied for the continuation of the franchise, with the defendant, Ford Motor Company, selecting Fabert over Kemper (App. 38). Fabert paid Kemper a considerable sum of money in cash, and conveyed to him certain vehicles and all of Fabert's interest in two commercial franchises owned by the partnership (App. 38). The continuing franchise was incorporated as Fabert Motors, Inc., wholly owned by the Fabert family, and the payments made to Kemper appear in the corporate balance sheet as debts owing to officers and shareholders (App. 38).

From 1955 to 1958, it was testified in Henry Ford's deposition, there was a sharp slump in the automobile industry in general (App. 148), and financial research records of the company showed the majority of Lincoln-Mercury dealers suffering losses in 1958 (App. 148).

In the fall of 1956, the defendant declared Rantoul, also located in Champaign County, an "'open point'' and in-

sisted that Fabert open a place of business there or the defendant would give a franchise to a competing Lincoln-Mercury dealer (App. 83, 84). Plaintiff's president, Elwood Fabert, protested that plaintiff could handle the Rantoul business effectively from Champaign and that such an operation would create a double overhead (App. 39, 84, 109). He was overruled—although defendant's field accountant testified that in 1958 he recommended the closing of the Rantoul operation as an unnecessary expense (App. 119). Defendant even produced a manager for the Rantoul operation who sold numerous cars under conditions producing many repossessions and great loss to plaintiff; this manager also embezzled substantial sums of money, only a fraction of which was recouped from the bonding company (App. 86, 88).

In addition, the defendant introduced the Edsel in 1957 which covered the same general size, weight, and price class as the Mercury (App. 135, 141), and which captured about 40% of its market from other Ford products (App. 149). In addition, the engine used in the large Mercurys and Lincolns in the 1958 model, introduced in the fall of 1957, was defective—and this caused substantial shrinkage in sales and resulting losses to dealers in 1957, 1958, and early 1959 (App. 149, 151).

As a result of these matters, the plaintiff's operation showed an annual net loss in the years 1956, 1957, and 1958. Moneys were advanced by its shareholders, as necessary, to the corporation; and, when a Bulk Sales Affidavit was filed on September 14, 1959—excluding shareholder advancements and indebtedness upon cars and parts, which it was agreed was customary in the trade (App. 44) —there was less than $11,000 owing to all third party creditors (App. 44) on an operation grossing annually in excess of a half million dollars (App. 44). Defendant's reports showed that plaintiff was at all times cooperative, that it conducted a good parts and service operation, and

that plaintiff was an "excellent dealer" (App. 116, 120, 121).

However, defendant had introduced the Edsel automobile in September, 1957, as a line of cars comparable to and competitive with the Mercury (App. 135, 141). By early December, 1957, Robert McNamara, an official of the defendant, had reported to defendant's Executive Committee, which report was approved by such Committee, that the Edsel program as it then existed was doomed to failure, leaving several optional courses of procedure, one of which was to cancel the whole program immediately, but that this would have adverse effects upon defendant's reputation and leave the defendant stuck with a number of unsaleable cars (App. 27, 156). Other studies and communications went back and forth from McNamara to the Executive Committee from which the following emerged: 1. The Edsel was a money loser both for the defendant and its Edsel dealers from the beginning, and had no prospects to be other than a money loser (App. 140, 141, 157, 160); 2. The Edsel dealers as a group lost money on their investments, the number of Edsel dealers shrinking from 1400 at the maximum to 226 on January 1, 1959, to 5 on November 18, 1959 (App. 136, 173). Despite the fact of these constant losses, and the negative outlook for the Edsel, Henry Ford upon February 19, 1959, wrote all of defendant's dealers as follows (App. 158):

> "You know that the Company regards the Edsel as a permanent member of the Ford Family of Fine Cars and that we are confident that the Edsel can and will prove to be a successful and profitable entry in present and future automotive markets. * * * We believe that the future for the Edsel is an excellent one, and we are backing up that belief with all the resources and talent required."

Early in 1958, the Executive Committee had decided upon a dualing program. This meant, simply, that the

Lincoln-Mercury dealer in any community would be ordered to take on the Edsel franchise (App. 136, 137), and to invest the additional amounts necessary for Edsel cars, parts, and equipment (App. 128, 159, 160). If the Lincoln-Mercury dealer refused to take on the Edsel franchise, the "facing" (i. e., dealer in the same community) Edsel dealer would be offered the refusing party's Lincoln-Mercury franchise (App. 28). This consolidation program was carried out on a nationwide basis (App. 136), and both Edsel dealers and Lincoln-Mercury dealers lost their franchises as a result (App. 137, 158, 173).

Upon May 13, 1958, the defendant's representatives, without plaintiff's knowledge, approached Eichhorst Motor Company, the Champaign Edsel dealer, with specific written instructions to terminate his franchise and merge it with the plaintiff (App. 132, 133). However, Eichhorst refused to surrender his franchise and defendant instructed its representatives to wait for "Phase 2"—a term which is never explained by any of defendant's officers or agents in their depositions (App. 133).

In February, 1959, T. A. Coward, regional manager of the defendant, called at plaintiff's premises and, according to plaintiff's version (which we must accept as true) told Elwood Fabert and his son that plaintiff would have to take on the Edsel franchise and invest an additional $40,000 to $50,000 in Edsel cars, parts, and equipment (App. 73). Elwood Fabert stated that plaintiff wanted nothing to do with the Edsel (App. 73, 74). He was told that plaintiff had no choice—that plaintiff would acquiesce or be cancelled (App. 74). Fabert asked for time to think it over.

Upon June 23, 1959, Coward returned to plaintiff's premises. He asked Fabert what plaintiff's decision was. Fabert stated that plaintiff would not take on the Edsel; it intended to sell Lincoln-Mercury automobiles as before

(App. 64, 101). Coward stated that plaintiff had no choice—that either it would take on the Edsel line, and invest those additional funds in it, or plaintiff could resign, or it would be cancelled. If cancelled, it would give plaintiff and Fabert a "black eye" and they could never get another franchise (App. 41, 64, 67, 74). Furthermore, Fabert would be wholly dependent upon market price for appraisal of signs and special equipment, which would be almost worthless to anyone not in that line (App. 64, 74, 102, 103). However, if plaintiff resigned peaceably, Coward would get plaintiff a better price for tools, signs, and equipment plus two-years' rental instead of the one year provided by the franchise in the instance of involuntary cancellation (App. 74, 102). It is not contended, by the way, by the defendant that any notice was given or other steps taken to effect an involuntary cancellation under the terms of the written franchise agreement.

Elwood Fabert testified that he believed Coward's representations, that he believed plaintiff had no choice, that he felt it was suicidal to take on the Edsel, and that plaintiff could not afford a "black eye" resulting from a cancellation (App. 41, 67). Based upon those beliefs together with the economic pressures created by the situation which had developed from 1956 through 1958, Fabert told Coward plaintiff would resign (App. 67). Coward wrote out in his own handwriting (App. 131, 125) a form for plaintiff to have typed up for this purpose. This was typed, signed, ratified by corporate minutes, and sent to Coward in a modified form after Coward had called Fabert and required the rent figure to be reduced from 24 months to 18 months (App. 42, 65, 79). After plaintiff had sent in this letter, defendant insisted this rent figure to be reduced to 12 months, and the form was rewritten with this change (App. 66, 82, 83).

Plaintiff redelivered to defendant its new cars, special tools, signs and equipment, receiving periodic checks or

credits as such items were received, plus the rent check of $24,000 upon signing a general release upon October 2, 1959, prepared by defendant, with the modification of inserting certain exceptions as to pending adjustments and an existing law suit based upon breach of warranty which matters had not then been concluded (App. 32, 33, 34, 35, 36).

Elwood Fabert testified that the franchise which the plaintiff was compelled to surrender had a fair cash market value of $300,000, based upon an average annual earnings during the period of 1946 through 1959 of more than $30,000 (App. 94, 95). Defendant, in its communications to dealers, also used a capitalization basis of 10% for the evaluation of a going business (App. 134).

SUMMARY OF ARGUMENT.

The defendant, Ford Motor Company, possessed vast economic superiority over the plaintiff, its Champaign, Illinois, Lincoln-Mercury dealer. It used this superiority unfairly by compelling plaintiff to open a second outlet (which caused serious financial inroads and which defendant agreed two years later served no useful purpose and discontinued). It introduced the Edsel as a car competitive to the Mercury; then, when the Edsel was an obvious failure, set up a dualing program. This was simply a program of "tying" the Edsels to the Lincoln-Mercurys; and, unless a Lincoln-Mercury dealer would take on the Edsel and invest an additionl $40,000 or more in such cars and parts, he would lose his existing franchises.

It is the plaintiff's position that the forced resignation of plaintiff, because of its refusal to take on the Edsel, was a result of economic coercion and precisely the thing which the Dealer's Day in Court Act was designed to prevent. Whether the release was executed of the plaintiff's own "volition", or was the result of compulsion, presents

a jury question. If the mere fact that a release was executed deprives a dealer of a right to jury trial, then there never would be a judicial remedy in any instance of forced resignation, since the manufacturer always would require some such instrument to be signed before repurchasing the dealer's cars and parts under the franchise agreement. Also, since the release was an Illinois contract, the Illinois law which requires the issues of "volition versus compulsion", and the adequacy or inadequacy of consideration, to be determined by the trier-of-fact inhibits the entry of a summary judgment, as was done here.

Such "tying" requirement also violated the Sherman Act.

ARGUMENT.

This is the Edsel case. Long the butt of comedians' jokes, it was no laughing matter to those Ford-franchised dealers who were told in 1958 and 1959 "take this automobile off our hands or lose your existing franchises"—and who lost franchises of great value because they would not do so.

The Seventh Circuit, it may be recalled, has an antipathy for civil antitrust cases and leads in the scoring race of reversals by this Court of such controversies. It has a like antipathy to the "Dealer's Day in Court Act" (15 *U. S. C.*, §§ 1221-1224) which confronted it for the first time in this suit, and which statute, apparently, presents a case of first impression in this Court. Although this statute was passed expressly to prevent cancellations, terminations, and forced resignations of a franchise if the dealer should refuse an unreasonable demand, the lower courts blithely ignored the statutory purpose as well as its wording.

The reason given below was, substantially, that the dealer had signed a "release" upon payment to him for his stock of new Lincolns and Mercurys, parts, tools, and rental payments. They failed to recognize that no case ever could arise of forced resignation without such an instrument having been signed. Certainly the manufacturer is not going to pay out funds in the repurchase of cars, parts, equipment, and premises rental—whether its action be innocent or culpable—without having such a document signed. The question was not what the words of the instrument recited, *but was its execution induced by duress*? And this point the Court of Appeals never grasped.

This is a controversy of universal importance, having a nationwide impact. All automobile manufacturers use a

printed form of franchise agreement which they prepare—and it was the abuses permitted to be perpetrated under such agreements and the coercive practices of manufacturers which led to the passage of the Dealer's Day in Court Act (Addendum, p. 1), Burns, *A Study of the Antitrust Laws,* pp. 436-465. The defendant, Ford Motor Company, prepared the contracts under which the original franchises were awarded (App. 91, 92), and under which the dealers made tremendous investments in their buildings, equipment, and inventory. A terminated dealer obviously will not receive one dime from the manufacturer without executing an instrument meeting the approval of such manufacturer. The more desperate the plight of the dealer, the more subject to pressure, the more susceptible to duress, he is—and the more likely he is to sign the instrument which the manufacturer demands. If, accordingly, the execution of a release *ipso facto* destroys the dealer's remedy, then the duress and compulsion inhibited by the statute could not even be considered by a jury—and this is precisely what the lower courts held in determining this issue upon a motion for summary judgment. Further, since a release is demanded by the printed franchise agreements, Ford, at least, would be immune from suit on any forced resignation.

If a dealer can be deprived of a franchise worth, as this one was (based upon the affidavits and depositions, App. 94), $300,000 with only a minimal payment or no payment made for its value, then the statute clearly is a sham and does not protect the dealer. Similarly, the "tying" of the Edsel to the continued purchase of Lincoln and Mercury automobiles would be condoned by a failure to grant review in this case. This is not the situation of a small manufacturer struggling for survival against the Big Three. It is a situation of one of the Big Three using its overwhelming economic power to impose unfair conditions upon its dealers.

In the explanation of the bill (Addendum, pp. 4, 5) it is stated:

> "Manufacturer coercion or intimidation or threats thereof is actionable . . . where it relates to the termination, cancellation, or nonrenewal of the dealer's franchise. * * * This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith in performing or complying with any of the provisions of his franchise or in terminating, canceling, or not renewing his franchise . . ."

It will be noted that the word "terminating" is used as well as "canceling". Obviously, then, a situation of forced resignation is contemplated, since otherwise there would be no need for the use of both terms. If judicial inquiry is contemplated, then it seems reasonable that it was intended to permit a jury to determine factual questions, instead of a trial court determining them as a matter of law by way of summary judgment.

Under the facts as herein stated, it would seem that the plaintiff has a right to jury trial. With reference to the matter of coercion, intimidation, and moral or economic duress, it was stated in 17 A *American Jurisprudence* 558:

> "Originally at common law, duress was limited to a narrow and restricted field, and according to the common-law doctrine and some later authorities following the common-law rule, to constitute duress there must be such constraint as is sufficient to overcome the mind and will of a person of ordinary firmness. However, there has been a gradual relaxation of these rules and under the modern doctrine of duress, the pressure applied does not have to be such as to overcome the will of a brave or courageous man, or even that of a man of ordinary firmness, but is

sufficient if it in fact overcomes the will of the person against whom it is applied."

As pointed out in Wolf v. Marlton Corp., 57 N. J. Super. 278, 154 A. 2d 625 at 630:

> "* * * a threat may be wrongful even though the act threatened is lawful. We have come to deal, in terms of the business compulsion doctrine, with acts and threats that are wrongful, not necessarily in a legal, but in a moral or equitable sense."

In that case, the plaintiff had threatened, if forced to perform the contract, to resell the house to an undesirable buyer and thus ruin the builder's reputation. It was held that this being duress, it was an anticipatory breach preventing recovery of the down payment.

The Illinois law has long recognized the fact that duress may be accomplished without placing a gun in the ribs of an individual in order to compel action from him. We have recognized that fear, whether physical or mental, economic pressure, or coercion of any type may vitiate the benefits secured as a result of such reprehensible conduct. One of the earliest decisions recognizing such terminology is Bradford v. City of Chicago, 1861, 25 Ill. 349 at 359:

> "But where a necessity, which is a kind of moral duress, exists, he may recover."

The doctrine has been announced in many cases in Illinois, including the recent case of Allison Co., Inc. v. Village of Dolton, 24 Ill. 2d 233, at 236, 181 N. E. 2d 151, citing Robertson v. Frank Brothers, 132 U. S. 17. The case of Slade v. Slade, 310 Ill. App. 77, 33 N. E. 2d 951, gives an extensive discussion of the Illinois cases, and, at page 87, defines moral duress as "the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another."

That case also points out, at page 82, quoting from 13 Corpus Juris, that:

"'* * * the question of duress is one of fact in the particular case, to be determined on consideration of the surrounding circumstances, such as age, sex, capacity, situation, and relation of the parties; and that duress may exist, whether or not the threat is sufficient to overcome the mind of a man of ordinary courage, it being sufficient to constitute duress that one party to the transaction is prevented from exercising his free will by reason of the threats made by the other, and that the contract is obtained by reason of such fact.' * * *

"'Where the parties are not at arm's length, but one of them is in a position to dictate, the courts will treat agreements which are influenced by threats of injury to, or the withholding of, property as made under duress * * *.'"

And the court added at page 86:

"'* * * the rule of duress and its application depends entirely upon the facts established at a hearing of the merits. There are other cases, where money or property having been accepted, it has been held the acceptance of such money is not a voluntary payment. They either had to accept it or depend on tort litigation as was suggested by the parties in this litigation."

Moreover, the court pointed out in *Slade* that it is not always necessary to rescind the offending contract. Rather, the plaintiff "may affirm the transaction, as far as it has gone, and sue in tort for her damages sustained by reason of the defendant's wrongful acts" (p. 88). Furthermore, if this is done, then, as pointed out in News Publishing Co. v. Associated Press, 114 Ill. App. 241 at 256, the plaintiff may, of course, bring suit at any time before it is barred by the Statute of Limitations. And in our case, we are not seeking to have the contract of termination cancelled and the franchise restored. The damage has already been

done; another was installed as Lincoln-Mercury dealer when the Fabert franchise was terminated.

So far as the antitrust violation is concerned, we refer to the opinion of this Court in Northern Pacific Railway Co. v. United States, 356 U. S. 1 at 5, 6:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. * * * '[T]ying agreements fare harshly under the laws forbidding restraints of trade.' Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 606, 73 S. Ct. 872, 879, 97 L. Ed. 1277."

And this is exactly what Ford did here. Mercury (and the Lincoln) was the desired product—indeed Fabert had a franchise entitling him to purchase such automobiles. But suddenly he was told, you cannot purchase any more Mercurys unless you purchase Edsels as well. Fabert did not want the Edsel. In fact, the tied product was so undesirable that the seller, Ford, did not want it either. In fact, some 47 days after completing the cancellation of the plaintiff for refusing to deal in the tied product, it, itself, discontinued making the Edsel.

The defendant has argued that there was no tying or forced sale arrangements because Fabert did not desire to deal in another type of car. As a matter of practical logic, however, the money had to come from somewhere; either the plaintiff would have to reduce its purchase of used cars, or its purchase of cars to be leased. Either could include cars not manufactured by Ford. But this test is required only under the specific language of Section 3 of the Clayton Act. The Sherman Act was meant to cover broadly certain types of inhibited conduct. Perhaps the clearest example of this principle is to be found in United States v. Paramount Pictures, 334 U. S. 131 at

156-159. There the defendants, distributors of films, were found guilty of violating the Sherman Act, Sections 1 and 2, by such practices as block-booking. This practice entailed the licensing of films in blocks, preventing competitors from bidding for films on their individual merits. There was no allegation that the prospective licensees were prevented from purchasing films of other producers if they so desired. But this was held to be an antitrust violation since it added "to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses."

And such reasoning would apply here where Ford Motor Company had, by patent, copyright, and trademark, a monopoly over all of its cars. Most people purchase automobiles relying upon a trade name; that is, they buy a Mercury or a Dodge rather than simply a blue car. Each brand of car is unique. And this uniqueness is what gives the product its tying power. Thus we have a situation similar to that in United States v. Loew's Incorporated, 371 U. S. 38, 48, where this Court stated:

> "The district judge found that each copyrighted film block booked by appellants for television use was in itself a unique product'; that feature films 'varied in theme, in artistic performance, in stars, in audience appeal, etc.,' and were not fungible; and that since each defendant by reason of its copyright had a 'monopolistic' position as to each tying product, 'sufficient economic power' to impose an appreciable restraint on free competition in the tied product was present, as demanded by the *Northern Pacific* decision. 189 F. Supp., at 381. We agree."

This Court went on to say, in a footnote:

> "To use the trial court's apt example, forcing the television station which wants 'Gone With the Wind' to take 'Getting Gertie's Garter' as well is taking undue advantage of the fact that to television as well

as motion picture viewers there is but one 'Gone With the Wind.' "

Thus it would appear that the defendant was guilty of tying or forced sales violations contrary to at least the Sherman Act but, also, probably, contrary to the Clayton Act. Nor is this prevented by the fact that Fabert never purchased the tied product but rather was forced out of business since he would not yield to the unlawful demands of the defendant.

In Simpson v. Union Oil Co. of Cal. (1964), 377 U. S. 13 at 16, the Union Oil Company refused to renew the consignment because the dealer would not fix prices, this action being part of an over-all price maintenance plan. The District Court entered a summary judgment for the defendant; this Court reversed, holding, as a matter of law, not even of fact, that price maintenance through the consignment agreement was illegal, saying:

> "The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws."

For an act in restraint of trade to violate the Sherman Act, Sec. 1, there may be either a "contract, conspiracy, or combination." The complaint alleged that Ford conspired with its dealers to restrain trade by tying the Edsel to the Mercury. Moreover, the complaint alleged an over-all pattern of making such tying *contracts*. It was these contracts which forced Fabert out of business.

To have a conspiracy, it is not necessary that co-conspirators gather around a table in a dimly-lit room and *sotto voce* discuss their nefarious schemes. Much less will be sufficient. This Court stated in Interstate Circuit, Inc. v. United States, 306 U. S. 208 at 226, 227:

> "It was enough that, knowing concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each

distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, * * * and knowing it, all participated in the plan. * * *

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. * * * Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

That language was adopted by this Court in United States v. Masonite Corp., 316 U. S. 265 at 275, in which this court pointed out that a conspiracy could still exist even though each dealer "desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others." This court also pointed out at 275, 276, "* * * the fact that Masonite alone fixed the prices and that the other appellees never consulted with Masonite concerning them [does not] make the combination any the less illegal. * * * The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action." Moreover, it has been pointed out that a conspirator is not protected by a claim that the illegal scheme was forced on him, United States v. Paramount Pictures, 334 U. S. 131 at 161. So Ford cannot claim that there was no conspiracy because it forced the other dealers to join in its scheme. Nor can it object that the other conspirators were not joined in the suit since each conspirator remains fully liable for the acts of all.

In addition, Ford was guilty of imposing tying contracts upon its other dealers. It is not necessary, it must be remembered, for any conspiracy whatever to be shown, so long as a practice of "contract" is shown which accomplished an illegal result. The plaintiff, in order to buy Mercury automobiles and to retain its existing franchises, would have been forced to accept a contract obligating it to assume an additional franchise—that of the Edsel—as well, with the accompanying expense of Edsel automobiles, parts, and equipment. To accomplish its dualing program, Ford had to force out of business either these Mercury dealers who would not accept the Edsel franchise or those Edsel dealers who already dealt in the tied product (App. 137). Thus the very existence of these contracts caused injury to the plaintiff. And this was a proximate injury, for Fabert was among those upon whom the restraints were being directly practiced.

It is not necessary that the extent of the antitrust violation have been earth-shaking. Indeed when the purpose of the Sherman Act is to protect the little man and small business, it is apparent that an abuse of his rights may not be of vast importance to the nation as a whole. As stated in United States v. Yellow Cab Company, 332 U. S. 218 at 225:

> "But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint."

This Court pointed out the irrelevance of the extent of public injury when it stated in Klors v. Broadway-Hale Stores, 359 U. S. 207, 213, that a boycott was not to be "tolerated merely because the victim is just one merchant whose business is so small that his destruction can make little difference to the economy". This rule was reiterated in Radiant Burners, Inc., v. Peoples Gas, Light and Coke Co., 364 U. S. 654 at 660, and in In Re

McConnell (1962), 370 U. S. 230 at 231. Thus, it was further stated in the first of those cases:

> "* * * to state a claim upon which relief can be granted under that section (§ 1), allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

It is not necessary, accordingly, to show a great and permanent harm to the public at large. Damage to the plaintiff was all that was required under the circumstances of this case. And just recently, this Court pointed out in Simpson v. Union Oil Co. of Cal., *supra*, 377 U. S. 13 at 16, a case involving the cancellation of a gasoline consignment agreement due to a refusal to fix prices:

> "There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant. * * * The fact that, on failure to renew a lease, another dealer takes Simpson's place and renders the same service to the public is no more an answer here than it was in Poller v. Columbia Broadcasting System, 368 U. S. 464, 473. * * *"

The lower courts seemed influenced by the fact that the discussions and execution of instruments took place over a period of months, and that the plaintiff did not immediately bring his action for damages. These are only factors to be considered upon the trial of the case. Otherwise, a trial judge would be placed in the position of determining whether two days is a reasonable period and three months too long, and other determinations which properly belong to the trier-of-fact. Where coercion or duress are applied, then an additional factor enters in. That is, was the effect of the duress—or the economic domination of the plaintiff by the defendant—ever effectively terminated before the release was signed? As stated in 17A *American Jurisprudence*, pages 594, 595:

"It is essential that the influence of the duress must be removed before conduct becomes voluntary. The fact that the act which was done under duress is not repudiated for a long time will not amount to a ratification where it appears that at no time during such period of time was the duress removed."

Similarly in 77 *A. L. R.* 2d at 434, 435 is stated:

"* * * the intention to ratify is an essential element and is at the foundation of the doctrine of waiver or ratification. * * *

" 'It is essential to the ratification of a contract procured by duress that the influence of the duress have been removed prior to the alleged ratifying conduct.' "

Likewise, it is stated in that same *A. L. R.* annotation at page 446:

"The effect, as such, of the alleged ratification of a contract induced by duress has been denied where it appears that at the time of the alleged ratification, or up to the time that repudiation is sought or that duress is urged as a defense, the duress that originally induced the contract has continued to operate."

Illinois follows that rule, Harris v. Flack, 289 Ill. 222, at 231, 232, 124 N. E. 377.

The Court of Appeals also mentioned the fact that the plaintiff dealership was represented by counsel. Every person has access to legal advice. If the fact of such access, or even of legal representation, rendered all releases effective, then the existence of fraud or duress would give no remedy against such overreaching. Absurd consequences well could result. For then if a man were to threaten to kill a loved one unless I should sign over a deed to him, and my lawyer, while lying under the table for protection, shouted: "Don't do it, he has no legal right to shoot," and I did hand over my deed, then ac-

cording to such reasoning I could not cancel it. Yet this result would scarcely seem to be reasonable or just.

In the present case, Lewis Tanner, who drew up the minutes of the so-called shareholders' meeting (it was a family corporation), was primarily an accountant and Hertz rental agent—as pointed out by the affidavit (App. 42) which is not subject to contradiction. He had originally secured the corporate charter for the plaintiff. But it has been stated by Mr. Fabert that at no time did he receive legal advice from Mr. Tanner on the situation here involved. It would not be expected that a man who acted as a lawyer part-time and whose main fields of endeavor lay in other directions, would be able to advise a client fully as to the existence of rights under statutes ordinarily known only to legal specialists.

And, assuming that Illinois law may bear upon the release, the Illinois cases indicate that the presence or availability of an attorney is merely a circumstance to be considered in determining whether duress existed at all. For example, in Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284 at 288, 167 N. E. 69, it was the attorneys for the trustees who made the payment under protest. Yet that fact did not determine the issue. As before pointed out, the Illinois Court looked to see if there was an easy remedy available instead. One would assume that a coal company would have an attorney, yet duress was found in the case of Chicago and Alton Railroad Co. v. Chicago, Vermilion and Wilmington Coal Co., 79 Ill. 121. Similarly, since the defendant was being sued when it paid the plaintiff in Pittsburgh Steel Co. v. Hollingshead & Blei, 202 Ill. App. 177 at 180, one might assume that it was then represented by counsel. The plaintiff in that case carefully pointed out that "defendant had full knowledge of the facts and was fully advised as to its rights." Nor was this denied by the defendant. Yet duress was still found to have existed.

That court emphasized that the fact that the defendant had full knowledge of the facts and of the law does not alter the fact that the plaintiff was guilty of duress. How much more is this true where the party guilty of duress or his agent has misrepresented the law as Coward did when he informed Fabert that Ford could cancel at any time for any reason, contrary to the Dealer's Day in Court Act! And Illinois has held that misrepresentations of law, even innocent misrepresentations, are grounds for rescission, Smyth v. Kasper American State Bank Co., 6 Ill. App. 2d 64 at 78, 127 N. E. 2d 149, affirmed 9 Ill. 2d 27, 136 N. E. 2d 796:

> "Whether the mistake is a mistake of law or of fact is not the important question when relief is sought in a court of equity."

The reasoning of Clancy v. Pacenti, 15 Ill. App. 2d 171 at 177, 145 N. E. 2d 802, which concerned a mistake of fact as to the degree of injury rather than a misrepresentation of law, might be applied here:

> "The sharp economic inequality of the bargaining parties which generally exists in this class of cases has also been considered by the courts in their consideration of the doctrine. It is by no means as modern an innovation as to some may appear."

The foregoing case points out that, under Illinois law at least, no return of consideration of the amount paid for a release is necessary prior to maintaining suit upon the underlying cause of action. And, in this case, that would be particularly true. All of the payments received by the plaintiff from the defendant were for tangible things—automobiles, equipment, parts, signs, etc.—except for $24,000, which was for "premises rental." The amount of that sum which could be ascribed, if any could be, as consideration for the intangible value of the franchise would be for a jury to determine. The plaintiff offered

by its complaint to pay to the defendant any sums found to exist as consideration, or to credit such amount upon the judgment; but these amounts, if any there be, must be determined by a jury.

If the efficacy of the release, being a contract in itself, is controlled by the law of the state in which it was executed, Illinois, then clearly a summary judgment would seem to be improper. Under the Illinois rule applicable to releases, as most recently pronounced by its intermediate court, the scrutiny of the circumstances is always for the trier-of-fact and it is not susceptible of being concluded by summary judgment, Reede v. Treat, 1965, 62 Ill. App. 2d 120 at 129, 210 N. E. 2d 833:

> "In furtherance of such policy, it has been stated that Illinois does not permit the language of the release, no matter how all-encompassing, to bar the chancellor from scrutinizing the release and the circumstances of its execution for fairness."

And this pronouncement is consistent with the most recent ruling of the Illinois Supreme Court in Bowman v. Illinois Central Railroad Company, 11 Ill. 2d 186 at 202, 142 N. E. 2d 104 (involving an F. E. L. A. case).

This would seem to be consistent with the view of this Court, as pointed out in Poller v. Columbia Broadcasting System, Inc., 368 U. S. 464 at 473:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

CONCLUSION.

It is, therefore, respectfully submitted that a writ of certiorari issue to review the judgment and orders of the Court of Appeals of the Seventh Circuit, heretofore entered in this cause.

Respectfully submitted,

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Certificate of Service.

I hereby certify that a true copy of the foregoing petition for writ of certiorari to the Court of Appeals of the Seventh Circuit has been served on W. Donald McSweeney and William A. Montgomery, Attorneys at Law, 231 South La Salle, Chicago, Illinois, this ... day of March, 1966.

Arthur L. Price, Jr.

STATUTES CITED.

U. S. C., Title 15, § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

U. S. C., Title 15, § 14: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale of contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

U. S. C., Title 15, § 15: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

U. S. C., Title 15, § 1221, *et. seq.*, Preamble to 70 Stat. 1125 (1956):

"An Act

to supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers by enabling franchise auto-

mobile dealers to bring suit in the district courts of the United States to recover damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers."

U. S. C., Title 15, § 1221: "As used in this chapter—

• • •

"(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract. • • •

"(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

U. S. C., Title 15, § 1222: "An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in de-

fense of any such action the failure of the dealer to act in good faith."

U. S. C., Title 15, § 1224: "No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States."

3 *United States Code, Cong. & Ad. News* (84th Cong., 2d Sess. 1956):

p. 4596. "Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is [p. 4597] required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts. The bill as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises. • • •

p. 4598. "Distributive conditions condemned by the Federal Trade Commission in its report on the motor-vehicle industry, issued in 1939, have continued up to the present time, according to investigations [of Subcommittees] • • •

"The Commission finds that motor-vehicle manufacturers, and, by reason of their great power, especially General Motors Corp., Chrysler Corp., and Ford Motor Co., have been, and still are, imposing on their respective dealers

unfair and inequitable conditions of trade, by requiring such dealers to accept, and operate under agreements that inadequately define the rights and obligations of the parties and are, moreover, objectionable in respect to defect of mutuality; that some dealers, in fact, report that they have been subjected to rigid inspections of premises and accounts, and to arbitrary requirements by their respective motor-vehicle manufacturers to accept for resale quantities of motor vehicles or other goods, deemed excessive by the dealer, or to make investments in operating plants or equipment without adequate guaranty as to term of agreement or even supply of merchandise; and that adequate provisions are not included for an equitable method of liquidating of such investments, sometimes made at the insistence of the respective motor-vehicle manufacturer. * * *

p. 4599. "The hearings of the investigations conducted during this Congress in the Senate contain numerous instances of automobile manufacturers coercing and intimidating their franchised dealers. A primary source of the manufacturers' power over their dealers stems from the unilateral nature of the franchise agreements. * * *

p. 4600. "This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith in performing or complying with any of the provisions of his franchise or in terminating, canceling, or not renewing his franchise. * * *

Explanation of Bill (4601-4604).

p. 4603. "The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts accessories, or sup-

plies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation. Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or to sell a specified quota of, parts, accessories, and tools made or approved by the manufacturer.

"Manufacturer coercion or intimidation or threats thereof is actionable . . . where it relates to the termination, cancellation, or nonrenewal of the dealer's franchise. Thus, where a dealer's resistance of manufacturer pressure is related to cancellation or nonrenewal of his franchise a cause of action would arise."

OPINION OF COURT OF APPEALS.

Knoch, Circuit Judge. Fabert Motors, Inc., plaintiff-appellant herein, filed its complaint in two counts in the United States District Court to recover damages from Ford Motor Company, defendant-appellee, hereinafter called "Ford," for violation of the anti-trust laws and the Automobile Dealers' Franchise Act, Title 15, U. S. C., §§ 1221-1225, respectively.

The District Court granted Ford's motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, and this appeal followed.

The District Judge had before him the pleadings, the deposition testimony, answers to interrogatories, affidavits, a statement of uncontested facts, and a stipulation respecting documents. Most of this material has been presented to us in the appendices filed by appellant and appellee.

In the first count, plaintiff asserts that pursuant to a conspiracy to combine Edsel and Lincoln-Mercury dealerships, Ford coerced its Lincoln-Mercury dealers into ac-

cepting the competitive Edsel agencies or relinquishing their Lincoln-Mercury agencies. Plaintiff alleges that plaintiff did not wish to accept the Edsel agency and thus was forced to submit its resignation and economically coerced into signing a general release on pain of forfeiting certain payments for merchandise, equipment and rental of the dealership premises in which plaintiff had made large investments. These payments made by Ford to plaintiff over a period of seven months totalled in excess of $86,000. Plaintiff seeks to recover treble damages and attorneys fees in the sum of $1,100,000.

The second count sets forth approximately the same facts and seeks damages of $300,000 under the Automobile Dealers' Franchise Act.

The plaintiff asserts that the general release, on which Ford relies, was secured through fraudulent concealment of the fact that Ford intended to discontinue manufacture of the Edsel. In its complaint, filed August 15, 1961, plaintiff offers for the first time to return the consideration received for the general release which was executed on or about October 2, 1959.

Negotiations concerning the resignation of the agency, release and payments were conducted over a lengthy period of some months and included several offers and counter-offers in the course of which there allegedly occurred two statements on which plaintiff bases its claim of coercion.

In February, 1959, about 8 months before the execution of the general release, Thomas A. Coward, Ford's Chicago District Sales Manager, during a visit to plaintiff's place of business in Champaign, Illinois, told Elwood Fabert, president, director and shareholder of plaintiff, that he had no choice in the matter of taking on the Edsel franchise because Ford could and would cancel him

out. Mr. Fabert testified that he told Mr. Coward that he did not believe that Ford would cancel him out and asked for time to think it over. He testified further that, at this conversation or at the later conversation described below, Mr. Coward pointed out the special financial advantages which would accrue to plaintiff from resigning its agency rather than having it canceled, in which latter case plaintiff would receive only what the agency contract required and nothing in addition to that.

The second conversation took place in June, 1959, about three months before the execution of the general release. At that time, Mr. Coward told Mr. Fabert that Ford wanted to have only one dealer handling both Lincoln-Mercury and Edsel by October 1, 1959, and that if plaintiff did not resign its agency, that agency would be cancelled. Mr. Coward wrote out by hand, a form of resignation, leaving blank spaces for insertion of figures.

After consulting with its attorney and after special meetings of the shareholders and directors of plaintiff (as recorded in minutes prepared by plaintiff's attorney) which are included in the record before us, plaintiff wrote Ford a letter of resignation dated July 2, 1959, using the terms suggested by Mr. Coward but inserting specific sums to be paid plaintiff for signs and tools plus $36,000 for rent on the premises and "benefits" under the original agency agreement. There were exchanges of correspondence and the parties agreed on a reduction of the figure of $36,000 to $24,000. This was still in excess of the amount which Ford would have been obligated to pay under the terms of its contract if the agency were cancelled. Plaintiff asserts the contrary in its briefs, but in his deposition, Elwood Fabert said there was no market in which signs and special equipment could be sold. The contract called only for the fair market value to be paid on cancellation. The agreement also provides that upon

termination by Ford, and in the event that the dealer so elects, Ford shall aid and assist the dealer in disposing of or leasing the dealership premises. However, Ford is not obligated to make any "rent" payments in the event that the dealer or anyone else occupies the premises for any purpose for a period of more than 90 days following the effective date of termination. In this case, plaintiff continued to occupy the premises and at the time of the general release had been engaged for almost a month in sales and service operations with reference to another make of automobile. The plaintiff was a lessee of the premises which were owned individually by Mr. and Mrs. Elwood L. Fabert.

Ford did combine its Lincoln-Mercury and Edsel agencies, appropriating about $5 million for financial assistance in liquidating dealerships. Eventually the program did prove unsuccessful and manufacture of the Edsel was discontinued with a further appropriation of nearly $1 million for settlement of discontinued Edsel franchises.

Plaintiff asserts that it would not have acted as it did had the short duration of the Edsel program been foreseen. It is stipulated, however, and that stipulation is supported by the uncontradicted record, that the decision to discontinue manufacture and sale of the Edsel was not made until November 18, 1959, some time after the general release was signed.

We agree with the District Judge that there was no genuine issue as to a material fact and that plaintiff's general release bars this action. The release was given for a substantial cash consideration. The allegedly coercive statements made months prior to the release constituted statements of fact known to plaintiff that Ford had certain legal rights under the contract between the parties and the announcement that Ford was disposed to assert those rights.

Plaintiff did not execute the initial release form proposed by Ford. Plaintiff's attorney revised that form by adding certain terms.

Plaintiff ratified the release by retaining some $62,000 already received from Ford and by accepting an additional $24,000 after signing the release. Plaintiff asserts that the sums received did not constitute consideration for its present claims but that in the event of a jury finding otherwise, these sums could be set-off against damages received by plaintiff if successful. Evidently a set-off against damages is the only type of tender plaintiff has in mind, as Mr. Elwood Fabert made clear when in the course of a deposition he was asked if he would return the sum of $24,000 and refused to do so unless paid the damages he sought.

The plaintiff's allegations of fact do not support the conclusory charge that Ford conspired to violate the anti-trust law. Uncontested documentary evidence shows that Ford made an independent business decision free of anti-competitive purpose. A contract or combination is essential to a violation of the anti-trust laws. *Weir v. Chicago Plastering Institute,* 7 Cir., 1959, 272 F. 2d 883, 887.

But in any event, the release discharged all claims with certain specific exceptions which do not concern us here. It was a general release covering the claims set out in the complaint. *Duffy Theatres v. Griffith Consol. Theatres,* 10 Cir., 1953, 208 F. 2d 316, 323-4 and cases there cited, cert. den. 347 U. S. 935; *Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp.,* 4 Cir., 1962, 311 F. 2d 389, 394. Nor was this release contrary to public policy. *Duffy v. Griffith, supra,* p. 324. Plaintiff was not unlawfully coerced into releasing its claims. Plaintiff was represented by counsel and executed this instrument only after due deliberation with knowledge of the per-

tinent facts. *Alloy Products Corp. v. U. S., Ct. of Claims,* 1962, 302 F. 2d 528, 530. Economic coercion is not established by showing that the release was given under pressure of financial circumstances under threat of Ford's having recourse to an action Ford was legally entitled to take. *Kohen v. H. S. Crocker Co.,* 5 Cir., 1958, 260 F. 2d 790, 792.

We have carefully considered all points and authorities to which our attention has been invited, but find in them no basis for disturbing the action of the District Court.

The judgment of the District Court is affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1151

FABERT MOTORS, INC.,

Petitioner,

vs.

FORD MOTOR COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1151.

FABERT MOTORS, INC.,

Petitioner,

vs.

FORD MOTOR COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTIONS PRESENTED.

Whether on the undisputed material facts as a matter of law:

1. Petitioner's general release executed and delivered to respondent on October 2, 1959 was voluntarily executed and is valid.

2. Petitioner ratified the general release by its conduct subsequent to October 2, 1959.

3. Petitioner has failed to show that in marketing the Edsel respondent entered into any tie-in agreement in violation of the Sherman Act.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE.

This litigation concerns the validity of a written general release executed by petitioner, an automobile dealer, on October 2, 1959 in favor of respondent, an automobile manufacturer (Ford). The district court below found the general release to be valid and granted summary judgment in favor of Ford, and the Court of Appeals affirmed. If the determination below that the release is valid is correct, the antitrust question need not be considered, since the release would constitute a complete bar to both counts of the Amended Complaint.

Because petitioner's statement of facts (Pet. 3-9)[1] is wholly inadequate, respondent will set forth a statement of facts. Many of the facts in the record are admitted, stipulated or uncontradicted; where the evidence is in conflict, respondent resolves the conflict in petitioner's favor for purposes of this brief. Viewed in this manner, *i.e.*, considering only those facts as to which there is no genuine issue, as required by Rule 56 of the Federal Rules of Civil Procedure, the material facts are summarized as follows:

The General Release.

On October 2, 1959—three months after petitioner first submitted to Ford its written resignation of its dealership—petitioner executed a general release of claims against Ford and delivered it to Mr. Gruendler, a Ford zone manager. This release was submitted by petitioner

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1. "Pet." refers to the Petition in this Court; "App." refers to plaintiff-appellant's appendix and "Def. App." refers to defendant-appellee's appendix as filed in the Court of Appeals; petitioner has filed both appendices in this Court.

to its attorney and revised by him before its delivery to Ford (App. 32-33; Def. App. 30-32, 61-62).[2]

At the time Elwood Fabert (president, director and shareholder of petitioner) signed and delivered the general release, Gruendler delivered to Fabert a Ford check, payable to petitioner in the sum of $24,000 (App. 31-32; Def. App. 142). This payment was made pursuant to the conditions of petitioner's resignation (see Def. App. 49-52). Petitioner also received all the other sums due under the conditions of the resignation. In addition to the $24,000, Ford paid petitioner $5,000 for signs and $1,000 for special tools, and it paid petitioner for parts and vehicles which it also repurchased. After Fabert signed the general release on October 2, 1959, Ford paid petitioner amounts aggregating more than $62,000 in respect of this repurchased merchandise over a seven-month period, the last payment being made on April 27, 1960. Thus, in all, Ford paid petitioner more than $86,000 in settlement of its resignation (App. 34-36).

Petitioner made no objection to the signing of the release on October 2, 1959 or at any other time (App. 32; Def. App. 24, 31). Petitioner has retained all of the sums received pursuant to its conditional resignation, and up to the time of filing its complaint herein on August 15, 1961, made no effort to rescind the resignation or release, or offer to return any of these sums.

Plaintiff's Resignation.

Elwood Fabert sent a letter to Ford dated July 2, 1959 requesting termination of petitioner's Lincoln and Mercury sales agreements and providing, *inter alia*, for the payment by Ford, to petitioner, of $36,000 representing eighteen

2. A chronology of the pertinent events preceding and following plaintiff's execution of the general release is set forth as an Appendix, *infra*, p. 1a.

months' "rent" including the benefits under paragraph 22 of the Lincoln and Mercury sales agreements (Def. App. 56-57).

Fabert received a letter from Ford, dated July 15, 1959, rejecting petitioner's offer of July 2, 1959, and indicating that Ford would not agree to reimburse it in the sum of $36,000 for the dealership premises but would only be willing to aid and assist petitioner in disposing of the premises to the extent provided by paragraph 22, with a maximum liability of the fair rental value of the premises for a twelve-month period (Def. App. 47-48).

Fabert sent in another request dated August 10, 1959, in which the amount was changed to $24,000, to include the benefits of paragraph 22. Ford accepted this request on August 21, 1959 (Def. App. 27, 49-52).[3]

Several months prior to the acceptance of petitioner's resignation by Ford and petitioner's later execution and delivery to Ford of the general release, Fabert had two conversations with Thomas A. Coward, then Ford's Chicago District Sales Manager, at Fabert's place of business in Champaign. Elwood Fabert testified that petitioner's allegation that its execution of the resignation and general release was compelled by coercion and duress is based solely on statements made by Mr. Coward in these two conversations (Def. App. 34-37).

The first of these two conversations was in February of 1959, about eight months before the general re-

3. Paragraph 22 of these sales agreements (Def. App. 42-46) provides that upon termination of the agreement by Ford and in the event the dealer so elects, Ford shall aid and assist the dealer in disposing of or leasing the dealership premises to a third party. In fact, petitioner itself continued to occupy the premises, carrying on an automobile dealership for another make of cars under a franchise agreement which it entered into only three days after the effective date of its resignation as a dealer for respondent (Def. App. 20-21, 25-26).

lease was signed (App. 173). Fabert testified that in this conversation Coward suggested that Fabert "put in * * * between $40,000 or $50,000 and take the Edsel franchise." Fabert told Coward that he was not interested. According to Fabert, Coward then stated that he didn't think Fabert had any choice in the matter because Ford could, and would, cancel him out. Fabert testified that he told Coward he didn't think Ford would cancel him, and asked Coward to "Let me think it over" (App. 73-77).

The second of the conversations with Coward occurred on June 23, 1959, over three months before the general release was signed (App. 174). Fabert testified that in this conversation Coward stated that they were going to combine "the operations" and only have one dealer by October 1; that Coward further stated that if Fabert did not resign, he would lose his franchise; and that Coward and Fabert talked about what kind of a settlement would be made upon such a resignation, *i. e.*, how much "rent" Fabert would be able to get Ford to pay. Coward said that there was a regular form which Fabert should use, and he then wrote out the form for Fabert to copy (see App. 131), leaving blanks for the amounts to be paid by Ford for the purchase of signs and special tools, and for rent. After it was written out, Fabert told Coward that he would "send the letter on" (App. 78-82).

In fact, Fabert sent in such a letter after consultation with the attorney for his dealership corporation and after holding special meetings of the shareholders and directors duly recorded in minutes prepared by the attorney (Def. App. 27-28, 56-60).

Ford's Franchising.

Ford manufactures and sells automobiles, including Lincolns and Mercurys, and during the period from approximately October, 1957 until November 18, 1959, Ford also manufactured and sold the Edsel. At the time Ford commenced the sale of the Edsel, it had a separate Edsel Division, and, basically, a separate dealer organization. A disappointingly low volume of sales soon made it apparent to Ford that a separate Edsel dealer organization could not survive. It was also believed by Ford that the position of the Lincoln-Mercury dealers could be strengthened by their adding the Edsel as an additional car line. Rather than discontinue the Edsel, Ford determined that it should be marketed in conjunction with the Lincoln-Mercury organization. On January 3, 1958, Ford decided to merge the Edsel and Lincoln-Mercury divisions, creating the M-E-L Division. On April 15, 1958, it decided to combine Edsel dealerships with Lincoln-Mercury dealerships, and in that connection to give resigning dealers as much financial assistance as possible in liquidating their dealerships. Over $5,000,000 was appropriated and spent by Ford for this purpose (App. 135, 171; Def. App. 64, 68-136).

On November 18, 1959, after experiencing a particularly disappointing reception by the car-buying public of the new 1960 model Edsel, Ford decided to, and did, discontinue the manufacture and sale of the Edsel (App. 171; Def. App. 136-141). Ford appropriated nearly $1,000,000 to be paid to dealers who then were carrying the Edsel, in settlement of the discontinuance of their Edsel franchises (Def. App. 138-141).

ARGUMENT.

A. There Are No Considerations Warranting Certiorari.

There is no issue in this case warranting review by this Court on *certiorari.*

Petitioner asserts that this case is "a controversy of universal importance, having a nationwide impact" (Pet. 11), but fails to show that this broad assertion is true. Actually the issue in this case is uniquely narrow since it involves the particular circumstances under which this petitioner executed and subsequently ratified a general release in favor of respondent.

As is apparent from the face of the opinion of the Court of Appeals, it made no general holding that petitioner's execution of the general release *"ipso facto"* destroyed its remedy. Rather, it determined from *all* of the undisputed *material* facts that petitioner (1) "was not unlawfully coerced into releasing its claims" and (2) "ratified the release." (Addendum to Petition, page 8.)

Thus, the decision as to both the execution and ratification of this particular release, having been based on the undisputed facts peculiar to this case, has no importance except to the parties involved, and "ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts." *Appalachian Power Company* v. *American Institute of Certified Public Accountants,* 4 L. Ed. 2d 30, 32, 80 S. Ct. 16, 18 (1959) (Brennan, *J.* as Circuit Justice).

Secondly, petitioner seems to assert that the decision below is in conflict with Illinois law as to the validity of a release in two respects. (Pet. 14-15, 22-25.) First it is suggested that proper standards were not applied to determine whether there was coercion or duress in the execution of the release and whether there was ratification of the release. Next, it is suggested that under "the Illinois rule applicable to releases" there can be no determination as a matter of law as to whether or not a release was executed under duress and for adequate consideration. None of the Illinois cases cited by the petitioner supports these contentions.

We shall demonstrate below that under Illinois and federal law petitioner's release was not only valid on execution, but also was ratified by petitioner's subsequent conduct.[4]

In support of its contention as to an "Illinois rule applicable to releases," petitioner cites two cases each of which is inapplicable to the instant case in several respects, *Reede* v. *Treat*, 62 Ill. App. 2d 120, 129, 210 N. E. 2d 833 (1965) and *Bowman* v. *Illinois Central Railroad Company*, 11 Ill. 2d 186, 142 N. E. 2d 104 (1957). (Pet. 25.) In *Reede*, the court is applying what it describes as the policy of the Illinois courts with regard to the setting aside of releases for personal injuries on the ground of mutual mistake of fact as to the extent of the injuries when there is inadequate consideration. *Bowman* involves the scope of appellate review of jury verdicts in cases under the Federal Employer's Liability Act. In F. E. L. A. cases there is a special body of federal law which the Illinois courts follow.

In any event, there is no Illinois (or federal) authority holding that the validity of a release cannot be determined by summary judgment. Rule 56 of the Federal Rules of

4. As is apparent from the following discussion, there seems to be no difference between federal and Illinois cases on what constitutes duress in the execution of a release.

Civil Procedure certainly makes no exception of releases, and Illinois courts determine the validity of contracts allegedly made under duress as a matter of law. (See *e.g.*, *Illinois Merchants Trust Company* v. *Harvey*, 335 Ill. 284, 167 N. E. 69 (1929), and *Prontzinski* v. *Baker*, 364 Ill. 451, 4 N. E. 2d 62 (1936), *infra*, pp. 12, 14.)

Poller v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962) (Pet. 25), has no application to the question of determining the validity of a release by summary judgment. Moreover, the language of *Poller* quoted (Pet. 25) contemplates the use of summary judgment even "in complex antitrust litigation" if used "sparingly." *Poller* does not foreclose summary judgment in the instant case for the further reason that petitioner's version of the circumstances of the execution of the release as testified to fully by its officers was accepted by both courts below.

Even if petitioner's argument on the alleged "antitrust violation" (Pet. 16-21) were accepted, it would not constitute a ground for further review of this case.

B. The Decision Below Is Correct.

The courts below correctly determined on the basis of the record before them that there "is no genuine issue as to any material fact" and that respondent is "entitled to a judgment as a matter of law." Rule 56(c) and (e) of the Federal Rules of Civil Procedure. The district judge stated that after considering the extensive record, accepting the petitioner's version of the transactions and giving petitioner the benefit of any doubt, he would have had to direct a verdict in favor of the respondent if there had been a jury trial.[5] (App. 70-72.) See *Lundeen* v. *Cordner*, 354 F. 2d 401, 407 (8th Cir. 1966).

5. Actually, the issue of the validity of the general release is equitable and would have been triable to the judge rather than a jury. *Ruggles* v. *Selby*, 25 Ill. App. 2d 1, 165 N. E. 2d 733 (1960);

1. *As a matter of law on the undisputed facts there was no "duress" or "coercion" when the release was signed.* Rather than contending that the *release* was signed under duress, petitioner argues that it acted under duress when Fabert told Coward on June 23, 1959 that he would submit to Ford a letter of resignation (Pet. 7-8, 16). The issue, however, is whether petitioner was under duress when it signed the general release executed on October 2, 1959, over three months after Fabert's last conversation with Coward in Champaign, which occurred on June 23, 1959 (App. 174).

On this record there is no basis to find duress in Fabert's execution of the general release. This record shows numerous deliberate actions on the part of Fabert and his corporation, subsequent to the Fabert-Coward conversations, toward resigning from the Lincoln and Mercury sales agreements and, in return for substantial cash payments, settling all claims with Ford. Each of these actions was taken pursuant to authority duly granted by the corporation's board of directors and shareholders, after Fabert had ample opportunity to, and did, consult with the corporation's attorney, Mr. Tanner.[6] Moreover, each of the succeeding actions was several weeks apart, during which time the opportunity for free reflection and reconsideration was fully present.

The applicable authorities—under both federal and Illinois law—show that on these facts as a matter of law there was no duress when the release was signed. It is funda-

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Reede v. *Treat*, 62 Ill. App. 2d 120, 210 N. E. 2d 833 (1965). Thus petitioner has in reality already had its full day in court, particularly because the district judge below had an exhaustive record before him and resolved all conflicts therein in petitioner's favor (App. 70-72).

6. Petitioner's attack on Tanner's competence and attempt to minimize his role in these events (Pet. 23) is based on portions of Elwood Fabert's affidavit which were ordered stricken by the trial court (Def. App. 10).

mental that a claim of duress may not be maintained where the alleged duress is not present at the time of execution of the contract sought to be avoided. *Shlensky* v. *Shlensky*, 369 Ill. 179, 186, 15 N. E. 2d 694, 698 (1938); *Kaplan* v. *Kaplan*, 25 Ill. 2d 181, 188, 182 N. E. 2d 706, 710 (1962).

The test as to whether duress, if once imposed, remains in existence is to be determined by the actions of the alleged victim. Thus petitioner's contention that the alleged duress continued as long as Ford did not perform some affirmative act to "remove" it is erroneous (see Pet. 21-22). The cases discussed below specify the objective facts—viewed from the point of view of the victim's conduct, and not that of the alleged wrongdoer—which, if present, refute a claim that a particular act was performed under duress or business compulsion. All of these facts are present here.

One of the factors which refutes a claim of duress is that the alleged victim was represented by counsel at the time of the alleged duress, or that he had an opportunity to secure legal advice before taking the action allegedly compelled, or at least that he acted with deliberation when he took that action. E.g., *Combined Bronx Amusements* v. *Warner Bros. Pictures*, 132 F. Supp. 921 (S. D. N. Y. 1955) (summary judgment granted); *Sekulow* v. *11th & F. St. Valet*, 162 F. 2d 19 (D. C. Cir. 1947); *Alloy Products Corp.* v. *United States*, 302 F. 2d 528 (Ct. Cl. 1962); *Lackey* v. *First National Bank of Oblong*, 309 Ill. App. 308, 32 N. E. 2d 949 (1941).

Another such factor is that the alleged victim had knowledge of, or had opportunity to know, all the pertinent facts at the time of the alleged duress. *Lackey* v. *First National Bank of Oblong*, 309 Ill. App. 308, 32 N. E. 2d 949 (1941); *Stone's Beauty Shops* v. *Morrison Service Association*, 285 Ill. App. 163, 1 N. E. 2d 816 (1936); *Alloy Products Corp.* v. *United States*, 302 F. 2d 528 (Ct. Cl. 1962).

Still another factor refuting a claim of duress or business compulsion is that the matter claimed to constitute duress consists of no more than the mere pressure of financial circumstances. *Fruhauf Southwest Garment Co.* v. *United States,* 111 F. Supp. 945 (Ct. Cl. 1955); *Kohen* v. *H. S. Crocker Co.,* 260 F. 2d 790 (5th Cir. 1958) (summary judgment granted); *McKenzie-Hague Co.* v. *Carbide & Carbon Chemicals Corp.,* 73 F. 2d 78 (8th Cir. 1934).

The fact that the victim of alleged duress had an available remedy, at law or in equity, as an alternative to taking the action allegedly compelled, also refutes a claim of duress. *Sekulow* v. *11th & F. St. Valet,* 162 F. 2d 19 (D. C. Cir. 1947); *Joyce* v. *Year Investments,* 45 Ill. App. 2d 310, 196 N. E. 2d 24 (1964); *Illinois Merchants Trust Co.* v. *Harvey,* 335 Ill. 284, 167 N. E. 69 (1929). A contract may not be rescinded because of one party's ignorance of the law. *Kazwell* v. *Reynolds,* 250 Ill. App. 174 (1928); see also *Warshawsky* v. *American Automotive Products Co.,* 12 Ill. App. 2d 178, 183, 138 N. E. 2d 816, 818 (1956); *Chicago* v. *Atkins,* 19 Ill. App. 2d 177, 182-83, 153 N. E. 2d 302, 304 (1958). Moreover, in *Illinois Merchants Trust Company* v. *Harvey,* 335 Ill. 284, 167 N. E. 69 (1929), the court, *in affirming a directed verdict,* establishes that it is the *existence* of a remedy, not the plaintiff's knowledge or lack of knowledge of it, which determines if duress has occurred. The statutes upon which petitioner relies in this case, and the remedies provided therein, were all in effect long before the events of which petitioner here complains.[7]

7. Further, it is Ford's position that in the circumstances of this case Ford had a legal right to terminate petitioner's Lincoln and Mercury sales agreements. See paragraph 17(a)(6) of the sales agreements (App. 177). Thus the purported Coward statements in February and June, 1959, merely informed petitioner that Ford would exercise its legal right, which does not constitute economic duress. *Kohen* v. *H. S. Crocker Co.,* 260 F. 2d 790, 792 (5th Cir. 1958); *Lackey* v. *First National Bank of Oblong,* 309 Ill. App. 308, 318-19, 32 N. E. 2d 949, 954 (1941).

The record in this case presents, on the undisputed facts, all of the factors relied upon in the above authorities as grounds for refuting a claim of duress. The courts below were correct in holding that as a matter of law the general release was voluntarily and freely executed and delivered by petitioner to Ford and is valid.

2. *Petitioner's general release is valid because petitioner has ratified it.* An additional ground supporting the validity of the release is that petitioner's conduct subsequent to its execution, and subsequent to the discontinuance of the Edsel, constitutes a ratification of the release.

Petitioner executed the general release on October 2, 1959 and the Edsel was discontinued on November 18, 1959. Subsequent to October 2, 1959, when Ford paid petitioner $24,000, Ford made numerous and substantial other payments to petitioner (App. 34-36). These payments, totaling more than $62,000, were paid over a period of time extending from October 6, 1959 to April 27, 1960.

Petitioner accepted and retained all of these payments. Further, between petitioner's willing acceptance of the last payment from Ford on April 27, 1960 and the filing of the complaint on August 15, 1961—a period of some sixteen months—petitioner made no effort to repudiate or rescind its resignation, nor to return any of these sums. Fabert testified that he never discussed the matter of the termination of his dealership with any representative of Ford other than Mr. Coward, and that he never wrote anyone any letters about it (Def. App. 23, 143). This fact is particularly significant in the light of the provisions of petitioner's sales agreements which required it to notify the Chairman of Ford's Dealer Policy Board of any acts of the kind petitioner now complains. (Def. App. 38.)

Under the applicable authorities, these undisputed facts lead to the conclusion that petitioner has ratified the general release and now has no right to set it aside. *E.g.*, *National City Bank of Chicago* v. *Wagner*, 216 Fed. 473 (7th Cir. 1914), certiorari denied, 235 U. S. 698 (1914); Annotation, "Ratification of Contract Voidable for Duress," 77 A. L. R. 2d 426, 428-29 (1961).

In *Prontzinski* v. *Baker*, 364 Ill. 451, 4 N. E. 2d 62 (1936), where plaintiffs claimed a contract had been executed under fraud and duress, the Supreme Court *affirmed the trial court's directed verdict* for the defendants at the close of all the evidence, stating (364 Ill. at 455-56, 4 N. E. 2d at 863-64):

> "We are of the opinion that the evidence produced by appellants does not show duress, coercion or undue influence. Even assuming that appellants, because of threats, were induced to sign the contracts on June 11 and 14, it is clear from their testimony that they not only were not influenced by coercion or duress on July 2, when they made the deed and bill of sale and accepted the purchase price, but that they did so after seeking and accepting advice from their own attorney. *This, even granting they had made a case of coercion as to the signing of contracts, constitutes a ratification of their former acts.* It is also significant that after signing the contracts appellants furnished an abstract of title and delivered it to Baker's attorney for examination." [Emphasis supplied.]

In *Duffy Theatres* v. *Griffith Consolidated Theatres*, 208 F. 2d 316 (10th Cir. 1953), certiorari denied, 347 U. S. 935 (1954), an antitrust case, the court, *affirming the trial court's summary judgment*, upheld the release of the asserted antitrust claim on the ground, among others, that the release was not void, merely voidable, and that plaintiff had not fulfilled his duty to rescind or disaffirm "with due diligence and within a reasonable time" after acquiring

knowledge of the facts supposedly constituting grounds for such rescission or disaffirmance.

This requirement of prompt disavowal of an act supposedly done under coercion is also recognized in many other cases. E.g., *Barnette* v. *Wells Fargo Nevada Nat. Bank,* 270 U. S. 438, 444 (1926); *Chatz* v. *Armour Plant Employees' Credit Union,* 154 F. 2d 236, 241 (7th Cir. 1946), certiorari denied, 329 U. S. 728 (1946); *Shell Oil Co.* v. *Cy Miller, Inc.,* 53 F. 2d 74 (9th Cir. 1931).

The fact that, prior to filing its complaint herein, petitioner did not offer to return any of the large amounts of cash paid to it by Ford is a particularly strong reason why petitioner must be held to have ratified the general release. A "tender or offer to return the consideration received for the release is ordinarily held to be a condition precedent to its being set aside." Annotation, 53 A. L. R. 2d 757, 758 (1957); *Kirkeby* v. *Avenue Hotel Corporation,* 330 Ill. App. 246, 70 N. E. 2d 423 (1947). An offer of set-off is not sufficient. *Wollenberger* v. *Hoover,* 346 Ill. 511, 577-78, 179 N. E. 42, 68-69 (1931).

3. *There is no evidence sufficient to raise any issue that Ford's action in marketing the Edsel constituted a "tie-in" in violation of the Sherman Act.* The alleged "tying" product and its market were not separate and distinct from the "tied" product and its market (App. 6, 39). *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 5-6 (1958); *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 614 (1953). There was no exclusion of competitive products and no agreement between petitioner and Ford. *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 5-6 (1958); *Susser* v. *Carvel Corporation,* 332 F. 2d 505, 512 (2d Cir. 1964), cert. dismissed, 381 U. S. 125 (1965).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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April 21, 1966.

APPENDIX.

Chronology of Events.

February, 1959	First Fabert-Coward conversation in Champaign	(App. 73-77, 173)
June 23, 1959	Second Fabert-Coward conversation in Champaign (*last act of alleged duress by Ford*)	(App. 78-82, 174)
July 2, 1959	Meeting of petitioner's shareholders and directors authorizing first resignation, and submission thereof to Ford, enclosing minutes prepared by petitioner's attorney	(Def. App. 56-60)
July 15, 1959	Ford letter to petitioner rejecting first resignation	(Def. App. 47-48)
August 10, 1959	Meeting of petitioner's shareholders and directors authorizing second resignation, and submission thereof to Ford, enclosing minutes prepared by petitioner's attorney	(Def. App. 49-50, 53-55)
August 21, 1959	Ford letter to petitioner accepting second resignation	(Def. App. 51-52)
September 8, 1959	Petitioner made dealer for Fiat and Triumph automobiles in same premises	(Def. App. 20-22, 25-26)
October 2, 1959	General release signed by petitioner after being redrafted by its attorney, and Ford payment to petitioner of $24,000	(App. 31-33; Def. App. 31-32, 61-62)
October 6, 1959	Ford payment to petitioner of $5,900.25	(App. 34-36)
October 28, 1959	Ford payment to petitioner of $3,442.17	(App. 34-36)
November 6, 1959	Ford payment to petitioner of $16,208.83	(App. 34-36)
November 9, 1959	Ford payment to petitioner for vehicles	(App. 34-36)
November 13, 1959	Ford payment to petitioner of $284.45	(App. 34-36)
November 18, 1959	Edsel discontinued	(App. 171)
January 11, 1960	Ford payment to petitioner of $107.25	(App. 34-36)
January 18, 1960	Ford payment to petitioner of $29,235.36	(App. 34-36)
January 28, 1960	Ford payment to petitioner of $1,432.63	(App. 34-36)
March 1, 1960	Ford payment to petitioner of $124.76	(App. 34-36)
April 27, 1960	Ford payment to petitioner of $4.57	(App. 34-36)
August 15, 1961	Complaint filed in this action	(App. 1)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1151.

FABERT MOTORS, INC.,
Plaintiff-Petitioner,

v.

FORD MOTOR COMPANY, a Corporation,
Defendant-Respondent.

REPLY BRIEF OF PETITIONER.

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6 Moore, Federal Practice, § 56.11 (3) 17

3 U. S. Code, Cong. & Ad. News, page 4596 (84th Cong., 2d Sess. 1956) 20

Wilson, Rufus E., Restraint of Trade Implications in Franchise Agreements, talk before Briefing Conference on Antitrust Laws & Trade Regulations sponsored by the Federal Bar Association and Foundation of the Federal Bar Association in cooperation with the Bureau of National Affairs, Inc., January 4, 1962 21

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1151.

FABERT MOTORS, INC.,
Plaintiff-Petitioner,

v.

FORD MOTOR COMPANY, a Corporation,
Defendant-Respondent.

REPLY BRIEF OF PETITIONER.

The brief of the respondent intermixes the several matters upon which it relies. For the convenience of this Court, we will try to group our replies to those matters under appropriate headings.

1. The impact of the Dealer's Day in Court Act is a primary question.

Before we correct the errors in factual statements made by defendant, let us point out that the questions in the case contained on Page 1 of the defendant's brief make no reference to the Dealer's Day in Court Act. Let us also take blunt issue with defendant's assertion upon Page 7 that this case does not merit review by certiorari.

This is a case of first impression; it will determine whether the Dealer's Day in Court Act is viable or ossified. If the decision of the lower court stands, the manufacturers have then evolved a method to circumvent the statute which is completely successful.

We sincerely believe, and urged in our Petition, that validity cannot be upheld of a release compelled by a manufacturer under circumstances bringing the Dealer's Day in Court Act into operation (10, 12):

> "If the mere fact that a release was executed deprives a dealer of a right to jury trial, then there never would be a judicial remedy in any instance of forced resignation, since the manufacturer always would require some such instrument to be signed before repurchasing the dealer's cars and parts under the franchise agreement. • • •
>
> "A terminated dealer obviously will not receive one dime from the manufacturer without executing an instrument meeting the approval of such manufacturer. The more desperate the plight of the dealer, the more subject to pressure, the more susceptible to duress, he is—and the more likely he is to sign the instrument which the manufacturer demands. If, accordingly, the execution of a release *ipso facto* destroys the dealer's remedy, then the duress and compulsion inhibited by the statute could not even be considered by a jury—and this is precisely what the lower courts held in determining this issue upon a motion for summary judgment."

At no place in its brief does Ford Motor Company even comment upon this point. By failing to join issue upon it, defendant tacitly concedes its accuracy. It prefers to speak of releases executed in situations of equal bargaining power. Not once is the Dealer's Day in Court Act mentioned. We will refer to this again shortly, in eval-

uating the matter of duress. But we say that the policy of that law prevents its circumvention by securing the execution of an instrument denoted as a letter of resignation, a release, or any other description. In some respects, it is similar to the F. E. L. A. where Congress has determined that certain persons shall be protected by law; a summary judgment upon a release issue in such a situation is almost inconceivable. This is a tremendously important problem, having a nationwide impact. If the Dealer's Day in Court Act is to fall, let it be by repeal of the Congress—not by a subterfuge countenanced by this Court.

This statute was not enacted as a result of the sudden whim of a legislator. It has a long legislative history, its purposes being pointed out in the Appendix to the Petition. There were powerful economic reasons compelling its enactment, as traced by Burns, *A Study of the Antitrust Laws*, pp. 436-465. If that purpose can be thwarted by compelling a dealer to submit a letter of resignation, or to sign a release, irrespective of the coercion preceding those steps or concurrent therewith, the dealer has gained no protection at all. Whether there was, in fact, fair dealing is a question which demands a full hearing.

Let us correct the errors in some of defendant's factual assertions; then we will return to this problem as it exists in this case.

2. Correction of errors of statement by defendant.

To be certain that this Court is not misled as to the facts here presented, it is well, in the inception, to correct several inadvertent misstatements appearing in the brief of Ford Motor Company. At no place, by the way, does the defendant assert that our Statement of Facts is inaccurate; at one place, it terms such statement "inade-

quate". Unfortunately this is precisely the reason why a trial on the merits is necessary, in order that the testimony of all parties and witnesses be received, rather than attempting to dispose of controverted issues (or attempting to evaluate the impact of threats or statements upon a person whom the trial court has never seen) by summary judgment. We have not even had an opportunity to present our evidence—even of the members of the Fabert family. And it is odd that, if Ford Motor Company had great confidence in the release issue, it would have waited more than three years to file its motion for summary judgment based thereon (App. 1, 2—Complaint filed August 15, 1961; motion on October 7, 1964).

The corrections of defendant's misstatement refer to the pages of defendant's brief:

Page 3—"and revised by him". At no time was the form of the release which defendant had prepared changed by the plaintiff. It was enlarged to exclude items then in the course of adjustment (App. 68). In fact, defendant on Page 5 of its brief pointed out that blanks were left in the form letter for the amounts to be paid for "the purchase of signs, and special tools, and for rent".

Page 3—"Petitioner made no objection to signing the release on October 2, 1959, or at any other time." Fabert protested the entire cancellation procedure to Coward, Ford's representative, who forced the resignation (App. 41, 64, 66, 74-76, 101-103); he expressed his dissatisfaction to Gruendler, who brought down the release (App. 68); and Mrs. Fabert called Norman Mitchell, who had been in charge of the area, and the Faberts also visited him personally; but Mitchell stated they would have to do as Coward directed (App. 110, 111).

Page 3—"Elwood Fabert sent a letter to Ford dated July 2, 1959, requesting termination." This is the same letter written up by Coward for Fabert to send in, a

photostatic copy of which appears in Coward's handwriting (App. 131).

Page 3—"Fabert sent in another request dated August 10, 1959, in which the amount was changed to $24,000" (one year's rent). Defendant omits all of the following which preceded that letter (App. 66, 67):

"Fabert: Tom, Detroit has rejected this letter you had me write. Now what happens?

"Coward: Well, you'll have to resubmit it for twelve months' rent. That's all they'll approve.

"Fabert: Tom, we started out with two years' rent, you told me to drop it to eighteen months which I did, that was rejected. Now you tell me they'll only approve twelve months' rent so I'm not any better off than if I was cancelled.

"Coward: That's not true. You're still getting a better deal on your signs, your tools, and you don't have a black eye from being cancelled.

"Fabert: This changes the picture quite a bit. I would still rather just stay here and sell Lincolns and Mercurys like I always have.

"Coward: You can't do that because we have already decided on a resignation for you or you're going to be terminated, so you might as well send in a request for twelve months' rent which I assure you will be approved. If we cancel you, we're going strictly by appraisal prices and you'll have a helluva time getting another franchise of any kind. You've got a pretty big plant there to be sitting idle.

"Fabert: So I still don't have any choice—only two, resign or be terminated.

"Coward: That's about the size of it. If you're smart, you'll send in the letter of resignation in.

"Fabert: What in the world am I going to do now?

"Coward: You'll find something to do. You are coming out of it without a black eye by resigning."

Page 5—In referring to the Coward conversations, defendant wholly omits Coward's statement that Ford could and would cancel plaintiff, without cause, if Fabert refused to take on the Edsel (App. 64-67); that such cancellation would give plaintiff a "black eye" and that plaintiff could never get another franchise (App. 64, 74); and that in order to take on such franchise, plaintiff would have to put in $40,000 to $50,000 into Edsel cars and parts (App. 63, 75).

Page 5—"Fabert sent in such a letter after consultation with the attorney * * * and after holding special meetings of the shareholders and directors." Fabert, by his affidavit and in his discovery deposition (taken by the defendant, obviously) stated that he believed Coward's threats and did not consult an attorney (App. 42); also that the so-called shareholders were himself, his wife, and son—that they held no formal meeting upon this but believed they had no choice except to do what Coward had demanded; and, following their family discussion, prepared the necessary papers and sent them in (App. 89, 90, 104, 105).

3. The application of the Dealer's Day in Court Act to these circumstances is not contested.

It is interesting to observe that at no place does the defendant, Ford Motor Company, assert that its conduct was not in violation of the Dealer's Day in Court Act. In its fifteen pages of objections to this Court reviewing the actions of the lower tribunals, in not one place is that statute mentioned, nor its legislative history or purpose, or its applicability to the circumstances here presented. Instead, defendant states, in effect: "we got a release from the plaintiff" and impliedly "so what if we got it the hard way, in violation of this statute. The plaintiff is bound by the release."

We believe that both the letter and spirit of this statute clearly prevent such forced resignations, where there is such a disparity in bargaining power. How can a court possibly pass upon an issue of this type until it has heard all of the evidence to determine the various economic pressures which have brought about the "breaking-point"; how can it determine the impact of threats and economic compulsion upon individuals without personally seeing those individuals, observing their demeanors, and weighing the impact of words and conduct upon them, perhaps even knowing their states of health? Each of the decisions relied upon by the defendant deals with a situation where the parties were of relatively equal strength, where they were dealing "at arms' length". It was the very disparity in bargaining power which brought about the enactment of this statute. Even though the present record is based wholly upon depositions taken for discovery purposes, and does not include the proof which the plaintiff would produce at the time of trial, nevertheless it disclosed that plaintiff was in a position to be particularly vulnerable to the exercise of such economic compulsion.

Keith Kemper and Elwood Fabert, and their wives, had the greatest seniority of any Lincoln-Mercury dealers in the United States (App. 37), with their franchise dating from 1940 and being actively operated except during World War II when both partners were in the armed services. They resumed active operation in 1946 and continued until the end of 1955 when a dissolution was discussed, with the question being resolved by Ford Motor Company as to which of the partners should carry on the franchise. It selected Elwood Fabert over his partner (App. 38), and a family corporation was created by the Faberts—this being the plaintiff here.

Certain economic factors then combined together to set the stage for the economic duress which was applied

effectively in 1959. Some of these factors were as follows:

1. In addition to turning over to Kemper all of Fabert's interest in several joint investments, the Faberts paid Kemper approximately $63,000 in cash (App. 38);

2. In 1956, the defendant required plaintiff to set up a branch operation in Rantoul, a step which Mr. Fabert protested and which was expensive, produced duplicate overhead, and increased repossessions without increasing gross sales (and which Ford eventually permitted plaintiff to discontinue late in 1958, App. 39). Indeed one of the defendant's own agents admitted that Rantoul could be quite adequately serviced from Champaign without the wasted overhead (App. 119):

> Q. Did you feel that that potential volume of new car business generated from that army base and from Rantoul could be serviced by the Champaign dealership?
>
> A. I think so, yes. * * *
>
> Q. Mr. Nowak, let me ask you this question: Did you feel in the year 1958 at the time you examined the Champaign premises that the Rantoul operation was losing money for the business?
>
> A. In my analysis, it appeared it was expensive to operate this lot as a separate facility, yes.

3. The man Ford insisted Fabert take as manager for the Rantoul operation not only sold cars for too low a down payment, causing numerously costly repossessions, but also embezzled thousands of dollars from the operation, only a fraction of which was ever reimbursed by the bonding company (App. 86, 87, 88). Of course, Ford did not suffer any loss since it did not reimburse Fabert for any of these losses caused by its protege.

4. The automobile market slipped from the period of 1956 to 1958 causing a serious drop in all dealer incomes (App. 148).

> Q.. Mr. Ford, was there any change in the general economic situation of the automobile business from the year 1955 to the year 1958? * * *
>
> A. '55 was the biggest automobile year that the industry had had since the end of World War II and actually the biggest year up until last year. '58 was quite a depression year, or recession year I guess would be better to say, for the industry, and our sales and production were way down as compared to what they were in 1955.

5. In 1957, the defendant introduced the Edsel which captured 40% of its sales from other Ford products; and, while overhead remained relatively constant, profits of the Lincoln-Mercury dealers slowly invaded by a competitor of the same manufacturer, went down (App. 151, 152).

> Q. Now, going back for a moment, Mr. Ford, to the memorandum of April 15, 1958 by Mr. McNamara, page four, right in the middle of that page in parentheses at the end of paragraph one which is numbered do you find the statement that, "The 1958 Edsel was probably drawing about 40% of its sales from other Company lines?"
>
> A. Yes.

It was also stated by others (Holden, App. 135):

> Q. What was the price class of the Edsel automobile?
>
> A. It spanned the so-called medium price class. It went from the so-called low price class to the high priced class. * * *
>
> Q. And did various models of the Edsel automobile

compare pricewise with the various products of the Mercury line?

A. Yes.

McCrea (App. 141):

Q. Was the Edsel in the same general price class as the more popular priced Mercurys?

A. I think it covered the entire range of Mercury price class, as my memory serves me.

Q. About the same general size, weight and cost?

A. Well, give or take, I would say generally this covers it, yes.

Vass (App. 143):

A. * * * It is my recollection that the original assumptions were that 50 per cent, approximately of Edsel volume would be incremental.

Q. In other words, the Mercury line sales would increase by about 50 per cent by the number of Edsels which had been sold, right?

A. As I recall, yes. * * *

6. In 1957-1958 the larger Mercury-Lincoln engines were defectively manufactured, causing drops in sales, loss of good will, and expensive repairs, for the years 1957, 1958, and 1959 (App. 151):

Q. Is it not a fact then that the 1958 model product quality has been a minor deterrent to M-E-L sales in 1958 and continued to hamper sales in 1959? * * *

A. It so states there in the memorandum. * * *

Q. Now, Mr. Ford, did these engines which had developed these difficulties hurt sales of Lincoln and Mercury automobiles in the model year 1958 which commenced in October of 1957?

A. It so states there in the memorandum. * * *

Q. And, of conrse, it also hurt sales in 1958, that is the calendar year 1958, did it not, sir?

A. Yes, that would be the answer.

These matters, along with others which will be shown in evidence, required the Faberts to pump their personal resources into the franchise in order to maintain it on a sound basis. And the franchise was on a sound basis. At the time of filing the required affidavit under the Bulk Sales Act in connection with the termination of the franchise, other than for advancements by themselves and amounts owing for automobiles and parts (which is admittedly customary in the trade), the plaintiff corporation owed less than $11,000 to all third party creditors, even though transacting a business in excess of a half a million dollars a year (App. 44). And as is shown by various exhibits, the operation of the plaintiff received repeated commendations from the defendants; and, at all times, the plaintiff was most cooperative in following any practices recommended or desired by the defendant (App. 120, 121):

> "I agree with Dick Yates, who handled this before, that this is an excellent dealer." (Dealer Contact Report of November 18, 1958.)
>
> "This dealership has an excellent parts operation." (Dealer Contact Report F657 of December 17, 1958.)
>
> "* * * Dealership was very cooperative in assisting this writer in setting up product and comparison meeting." (Dealer Contact Report F638 of 2/14/57.)
>
> "We believe that Fabert Motors, Inc., will provide very good representation in their area. * * * We will appreciate approval of this sales agreement as soon as possible." (Letter from T. A. Coward of March 20, 1958.)

Coward (App. 124):

> Q. You would say he was a cooperative dealer in that regard.
>
> A. Yes, sir. I would say he was a cooperative dealer in all respects. * * *

McBain (App. 116):

Q. Did you consider Mr. Fabert to be skilled in the automobile sales field?

A. Yes.

Q. And was he cooperative and conscientious, so far as you were concerned?

A. Yes.

Q. With reference to the service department, were you acquainted with the service manager Julian Smith?

A. Yes.

Q. Did you consider him to be well qualified?

A. Yes.

It is obvious, accordingly, that the plaintiff was an excellent dealer who would not have been cancelled or forced to resign except for its refusal to accept the Edsel franchise. This is the type of a dealer whom any manufacturer would want to retain—except for the fact that it refused to accede to the illegal demands presented by the "tie-in" arrangement. Furthermore, as pointed out in the Petition, Ford obviously had no intention of terminating Fabert in the inception—but had intended to terminate Eichhorst and had even approached Eichhorst in 1958 for the purpose of terminating him, and not with the acquiescence or cooperation of Fabert (App. 132, 133). And, at all times, the Fabert franchise was in much better financial condition than was that of Eichhorst (App. 133, 134).

4. Ford's conduct cannot be justified as a business decision.

The defendant, Ford Motor Company, upon page 6 of its brief, seems to argue that the various actions which it took were due to proper business decisions the necessity of which became apparent almost immediately after

the Edsel was introduced. Interestingly enough, in this very suit, the defendant denied that any dualing program existed at any point of time. The Amended Complaint alleged in paragraph 6, Count I, which is substantially paragraph 7, of Count II, as follows:

> "6. That in the year 1959 the defendants, in violation of the franchises of the plaintiff, demanded that the plaintiff add to its lines of automobiles sold and serviced a certain automobile in a price class competitive to the Mercury line already carried by the plaintiff, such other automobile being known as the Edsel, and demanded that the plaintiff invest many thousands of dollars in such Edsel automobiles, special equipment, and parts for the servicing of such automobiles; that at such time the defendant already had a franchised dealer in Edsel automobiles in the City of Champaign, County of Champaign, and State of Illinois; and that similar demands were made of many of defendant's other dealers throughout the United States."

The respondent admitted by its answer (App. 19) that it had a franchised dealer in Edsel automobiles in the City of Champaign, Illinois and then stated: "* * * it denies each and every other allegation in the said paragraph 6."

The petitioner then went on to allege (App. 6-12) that the respondent engaged in a course of conduct designed to force such dealers to resign their franchises if they did not acquire the Edsel franchise; this, again, the respondent denied by its Answer (App. 19, 22). It was not until the petitioner had taken the depositions of every active executive official of the Ford Motor Company and had required the production of documents by the respondent which conclusively proved this "tie-in" policy that the respondent now cavalierly admits that such dualing

program was in effect in 1958 and 1959. No longer can it deny these matters.

Now that the respondent feels it must admit the fact that such dualing operation was going on, it attempts to justify it on the basis that such was a business decision, and that it had a right to act as it did. There is no question but that it was sound business to discontinue the manufacture of the Edsel; however, this did not condone attempting to shift the loss to the dealers in other makes of automobiles. Ford had no right to deliver an ultimatum to the plaintiff that it add a franchise which had no value. A review of the history of the Edsel helps to clarify this situation.

Within three months of the time it was introduced in 1957, one of the recommendations made in a study by Ford's Robert McNamara, was to cancel the Edsel immediately—but this was not followed because of the large losses it would cause in unsold cars and parts (App. 26, 27, 156). The next year, 1958, the defendant decided to consolidate Edsel and Lincoln-Mercury dealerships by forcing Lincoln-Mercury dealers to take on the Edsel franchise; or, if they would refuse to do so, to take their franchises away and give those franchises to the competing Edsel dealer, thus keeping alive a market for getting rid of the Edsel automobiles and parts (App. 136, 137). It is admitted in the Henry Ford deposition that this would require a substantial investment upon the part of any Lincoln-Mercury dealer for Edsel automobiles, parts, equipment, and special tools (App. 159, 160). The delicate term used, in this dualing situation, was to "encourage the dealers to resign" (App. 28, 29, 137). Throughout 1958, the intracompany memoranda of the defendant state the Edsel never made money and never will, and that there is no prospect of it ever producing a profit either for the company or for the dealers, and this fact was also admitted by the defendants in their depositions.

(Miller deposition, App. 141)

A. Yes, I am sure that the Edsel operation cost the company money every year we were in it.

Q. And that's why you got out of it. Is that right?

A. That is why we got out of it, yes, * * *

(Learned deposition, App. 140)

Q. So, so far as you are personally concerned, your concurrence in this decision was based upon the fact that the Edsel was a money loser?

A. And had no great prospects to be anything but a money loser.

(Henry Ford deposition, App. 161)

Q. Now, does this same memorandum of April 15, 1958 at page two state as to the Edsel franchises:

"This condition cannot be changed without the investment of substantial new capital by the dealers and the Company. The prospects for earning a return on such new investments, either for the separate Edsel dealers as a group or for the Company, are nil."

Does it so state?

A. Yes, it so states.

Despite these grave concerns over the future of the Edsel, on February 19, 1959, Henry Ford II, the company president, wrote all dealers of Ford products, as admitted in his deposition (App. 158):

Q. Mr. Ford, did you not just nine months to the day before the Edsel was abandoned write a letter to all M-E-L dealers as follows:

"You know that the Company regards the Edsel as a permanent member of the Ford Family of Fine Cars and that we are confident that the Edsel can and will prove to be a successful and profitable entry in present and future automotive markets."

Does your communication so state?

A. The communication so states.

Q. Does it also state this:

"We believe that the future for the Edsel is an excellent one, and we are backing up that belief with all the resources and talent required." * * *

The Witness: That's what this states, yes.

Q. Now, at the time you wrote that letter, Mr. Ford, had the Edsel ever made a profit in any year for the Ford Motor Company?

A. Not to the best of my recollection. * * *

The encouraging statements in Ford's letter to his dealers about a fine future for the Edsel were, frankly, untrue. Yet in this atmosphere the district manager, T. A. Coward, came to Champaign to call upon Elwood Fabert. Coward did not tell Mr. Fabert that six months earlier they had tried to terminate the Edsel dealer in Champaign, Eichhorst Motors, but that Eichhorst had refused to quit. Coward stated, as related by Fabert, that Fabert had to take on the Edsel and invest another forty to fifty thousand dollars in Edsel cars, parts, and equipment. Fabert stated that he wanted no part of the Edsel (App. 73, 75, 100). He was told that he had no choice—if he would not accept the Edsel, he could either resign or be cancelled (App. 74). If he were cancelled, he was told that he would have "a black eye" and have a tough time getting another dealership of any type (App. 74). Also he would be stuck with his used signs and equipment. And, while Ford was required by contract to repurchase these, yet Ford would bring in an appraiser to determine their "true" worth and Coward suggested that they would be found to be "practically worthless" (App. 74, 75, 102). There were two such conversations to the same general effect. Fabert believed that Coward was telling the truth, and that the defendant had the power to do that which he stated it would do. Owning a single purpose building suitable for nothing more than automobile sales and repairs, with great personal financial pressure resulting

from the matters previously described and fearful of the consequences of a company-induced cancellation, Fabert believed there was no alternative. He could not put another forty to fifty thousand into the business except by loans on property of value, and the Edsel, in his judgment, had no value. When Coward, in the course of the second meeting, issued his ultimatum Fabert surrendered. Whether a person of greater fortitude or stamina, or in better health, would have surrendered under those circumstances is to be determined after hearing and observing the witnesses. It is precisely for these reasons that this Court stated in Poller v. Columbia Broadcasting System, Inc., 368 U. S. 464 at 473 that trial "by affidavit is no substitute for trial by jury" and that it was stated in 6 Moore, *Federal Practice,* § 56.11 (3):

> "Since live trials are desirable, with the witnesses present in court and subject to cross-examination and their demeanor observable by the trier of the facts, the summary judgment procedure does not contemplate a trial by affidavits."

While the defense states in a footnote that: "the district judge below had an exhaustive record before him", he did not have a record which the plaintiff would introduce upon a trial upon the merits—nor can a poor man ever litigate against a corporation if he is placed in a position where he must try his lawsuit by deposition, instead of by witnesses. He is then simply priced out of court.

The defendant also refers to the amounts paid by it to the plaintiff—also to the fact that no such amount was repaid prior to suit. As pointed out in the Petition, the defendant received parts, equipment, and cars for the moneys which it paid, except for rental; only the trier-of-fact can determine what, if any, consideration existed separate and apart for tangible things as a foundation for the release; Illinois law does not require a tender, in all

events, of the consideration paid for a release, Ruggles v. Selby, 25 Ill. App. 2d 1 at 21, 165 N. E. 2d 733; and the minute that Ford Motor Company had replaced Fabert with Eichhorst as its dealer, nothing which Fabert could do ever could restore the former status. This suit is the only remedy left. And we do not believe a subterfuge of this type can destroy the vitality of the Dealer's Day in Court Act.

So far as the assertions of ratification and promptness in acting are concerned, again we believe these are factual questions to be determined from hearing the words of witnesses and observing their demeanor. Once an action has been taken which possesses completely finality, no action short of litigation could benefit the plaintiff. And, as pointed out by the authorities cited in the Petition—at no point of time, when these various instruments were being required of the plaintiff, was the economic coercion or duress removed. At least, such is a question to be determined upon a full hearing.

5. Ford's conduct amounted to a "tying" violation.

Along with never making mention of the Dealer's Day in Court Act, the defendant refers to the Sherman Act almost casually, in its last paragraph. We believe this point is adequately discussed in the Petition and will not discuss it further. Let us reiterate, however, that the fact that plaintiff did not join in the improper conduct demanded by defendant—but suffered the loss of its franchise instead—does not prevent defendant's conduct from being illegal.

We do not believe, as asserted by defendant in footnote 7, that a manufacturer has a right to cancel a dealer without cause, such franchise constituting valuable property of the dealer. In this position, the parties are diametrically opposed. True, in this case, Ford did not attempt to cancel the dealer for cause, so that this may be

academic; but, if we are correct upon our position, a cancellation cannot be compelled for improper reasons. This Court has never squarely determined this matter. It should be determined now.

6. Ford cannot impose a condition precedent to a statutory remedy.

The defendant has urged (page 13, bottom) that the plaintiff is precluded from bringing suit because it failed to complain to Ford's Policy Board. The defendant in its motion for summary judgment did not limit this defense to Count II. However, we can hardly believe that the defendant is seriously contending that it could create a defense based upon a contractual provision to preclude an action for a tortious violation of the antitrust laws. But even as to Count II, it is apparent that such clause would be inapplicable and invalid. The clause in question reads:

> "In the interest of maintaining harmonious relationships between the parties to this agreement, the dealer shall report promptly in writing to the Chairman of the Company's Dealer Policy Board, or to such other person as may be designated by the Executive Committee of the Company from time to time, any act or failure to act on the part of the Company or any of its representatives, which the dealer deems not to have been, or that the Dealer proposes to use in support of a claim that the Company has not acted in good faith as to the dealer."

One could question whether such is relevant where the dealer is in the process of being cancelled. One is hardly interested then in "maintaining harmonious relationships between the parties." And in a suit for damages under the Act, such failure to give notice is at most only a factor to be considered by a jury in determining the question of good faith, Blenke Brothers Co. v. Ford Motor Co.,

D. C. Ind., 217 F. Supp. 459 at 464. A summary judgment, it was held in that case, would not lie for failure to seek a remedy from the board.

Indeed, it would seem to be against public policy to allow the manufacturer to impose any condition upon the right of a dealer to statutory relief. If it could do so, then an employer could insist that an employee submit his injury claim to a panel of its executives before filing for workmen's compensation. The Policy Board, unlike the Dealer's Council, is comprised of salaried representatives of the defendant and is wholly within the defendant's control (App. 43). As pointed out by Mr. Fabert, recourse to the board was a fruitless thing in avoiding a threatened cancellation as he knew from personal experience (App. 43).

Moreover, it should be remembered that the purpose of the act was to create "a cause of action where none previously existed in that, irrespective of contractual provisions, it grants a right of review in the Federal courts of disputes between automobile manufacturers and their dealers involving the good faith of the manufacturer in complying with, in terminating, or in not renewing franchises." 3 *U. S. Code Cong. & Ad. News,* page 4596 (84th Cong. 2d Sess. 1956). The discussion commencing upon that page and ending upon page 4601 is most enlightening. To enforce a provision in a contract requiring a dealer to appeal to a handful of the manufacturer's employees is to impede the judicial remedy granted by Congress. Blenke Brothers Co. v. Ford Motor Co., *supra,* 217 F. Supp. 459 at 464.

CONCLUSION.

We must constantly bear in mind that there was no finding on the merits in favor of the defendant following a full and fair trial. Here, a summary judgment was entered in favor of the automobile manufacturer without

the plaintiff ever having had a day in court upon the merits. The abuses to which dealers of the Big Three have been subjected are well pointed out in the *Burns* book, the *Wilson* monograph, and the Addendum to the Petition. As this Court pointed out in the *White Motor Company* case, p. 263:

> "Thus, unless the tying device is employed by a small company in an attempt to break into a market * * * the use of a tying device can rarely be harmonized with the stricture of the antitrust laws, which are intended primarily to preserve and stimulate competition."

We have a situation here where Ford Motor Company originally denied that it had attempted to force its various franchise holders to take on the losing Edsel franchise as a condition of retaining the businesses which they had built up over a period of years, and which possessed great value to them. The services which they had rendered to customers for many years, the advertising which they had done in an effort to create good will, and the repeat business which resulted therefrom all went down the drain unless they would accede to the demand made upon them. This demand was made at a time when severe economic pressures had been placed upon the dealers by reason of general economic conditions, competition by another car within the same price class manufactured by their own company, and two years of bad engine models—plus the additional factor, in Fabert's case, of requiring him to open up an unnecessary branch in Rantoul which caused three years of duplicate expense. Ford then stated to Fabert: "Take the Edsel or resign; if you do not resign, we will cancel you—and you will never get another franchise, nor the full value for your parts and equipment."

Execution of a release under circumstances of such a forced resignation would seem to present the precise

situation which the Dealers Day in Court Act was designed to prevent. The "tie-in" demand also would seem to violate the antitrust laws. At least, it seems reasonable to believe that factual questions are presented for jury determination as to whether or not the manufacturer acted coercively in this case, whether adequate consideration was paid for the release of the franchise, whether the petitioner should have succumbed to the pressure, and any other questions reasonably presented. If trial judges are to resolve such issues summarily, then this Court's observation in Poller v. Columbia Broadcasting System, Inc., 368 U. S. 464 at 473, should be modified. However, we believe the language and spirit of that decision should be followed.

In view of the fact that the principles involved in this case concern thousands of automobile dealers and the construction of these important statutes, we earnestly pray that a writ of certiorari issue to review the judgment and orders of the Court of Appeals of the Seventh Circuit heretofore entered in this cause.

Respectfully submitted,

FABERT MOTORS, INC., a Corporation,
Plaintiff-Petitioner,

ARTHUR L. PRICE, JR.,
One of such attorneys.

JEAN APPLEMAN,
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As attorneys for petitioner.

Certificate of Service.

I hereby certify that a true copy of the foregoing Reply Brief of Petitioner has been served on W. Donald McSweeney and William A. Montgomery, Attorneys at Law, 231 South La Salle, Chicago, Illinois, this 25 day of April, 1966, by air mail.

Arthur L. Price, Jr.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1151.

FABERT MOTORS, INC.,
Plaintiff-Petitioner,

v.

FORD MOTOR COMPANY, a Corporation,
Defendant-Respondent.

PETITION FOR REHEARING.

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FORD MOTOR COMPANY, a Corporation,
Defendant-Respondent.

PETITION FOR REHEARING.

Now comes the plaintiff-petitioner, Fabert Motors, Inc., and respectfully petitions for a rehearing of the denial entered May 16, 1966 of the plaintiff's petition for writ of certiorari.

GROUNDS OF PETITION.

This Court, for the first time, was faced with the construction of the Dealer's Day in Court Act. The purpose of the law is clear. One of the Big Three has found a clever way to circumvent the operation of the law if the result of the Court of Appeals stands.

The automobile dealers of America are entitled to a construction of this statute and to an answer as to what rights, if any, they possess. If a manufacturer says: "Do this, or we'll cancel you," must they answer: "Go ahead and cancel," irrespective of the losses entailed—or will they know that a remedy exists, under this law, if a resignation is compelled by force of economic circumstances and undue pressure? This Court is busy, but not too busy to answer that question or to interpret that statute. The rights of automobile dealers the nation over are as important as the right of a colored gentleman to tap dance for his own entertainment in a restaurant (or tavern) in Louisville.

Respectfully submitted,

FABERT MOTORS, INC., a Corporation,
Plaintiff-Petitioner,

ARTHUR L. PRICE, JR.,
One of such attorneys.

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Certificate of Service.

I hereby certify that a true copy of the foregoing Reply Brief of Petitioner has been served on W. Donald McSweeney and William A. Montgomery, Attorneys at Law,

231 South La Salle, Chicago, Illinois, this 17 day of May, 1966, by air mail.

Arthur L. Price, Jr.

Arthur L. Price, Jr., being first on oath duly sworn, deposes and says that he is one of the attorneys for the petitioner; that the petition is restricted to the grounds above presented in combination with those heretofore presented; that this petition is presented in good faith and not for purposes of delay.

.....

(Seal)

Subscribed and sworn to me this 17th day of May, 1966. I am duly authorized under the laws of the State of Missouri to administer oaths.

.....

Notary Public within and for the
City of St. Louis, Missouri.